IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 421 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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MRS. JAKIA NASIM AHESAN HUSSAIN JAFRI, AT PRE. R/A. & 1 - Applicant(s)
Versus
THE STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR MM TIRMIZI for Applicant(s) : 1 - 2.
MR KAMAL TRIVEDI, ADVOCATE GENERAL for Respondent(s) : 1,
None for Respondent(s) : 2,
MR YN RAVANI for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 02/11/2007

ORAL JUDGMENT

1. Present petition has been filed by the petitioners herein (petitioner No.1 – original

complainant) under Article 226 of the Constitution of India, read with Section 482 of the Criminal Procedure Code, for an appropriate Writ, direction and/or order directing respondent No.2 – Director General of Police, State of Gujarat, Gandhinagar to register complaint given by the petitioner No.1 dated 08.06.2006 as F.I.R. and to further direct same to be investigated by independent investigating agency i.e. Central Bureau of Investigation i.e. Respondent No.3 herein.

2. The case on behalf of the petitioners as so stated in the petition in nutshell is as under :

The petitioner No.1 – original complainant has lost her husband who happened to be Ex.Member of Parliament, in the offence occurred between 27.02.2002 and 10.07.2002 especially on 28.02.2002. The petitioner's husband was brutally killed alongwith 68 others on 28.02.2002 by the miscreants by surrounding the Gulberg Society where the petitioner lived along with her family at that time. The police registered FIR being CR No.I – 67 of 2002

with Meghaninagar Police Station, Ahmedabad. The case is committed to the Court of Sessions, Ahmedabad. It is further the case of the petitioner that they have received certain material to show that the offence occurred during 27.02.2002 and 10.07.2002, were aided, abetted and conspired with the co-accused persons involved in the mass carnage by the responsible persons in power and in connivance and pre-planning with the State administrative and police machinery of the 'State of Gujarat'. Therefore, petitioner No.1 sought to register the First Information Report against the accused named in the complaint dated 08.06.2006 for the offence punishable under Section 302 read with 120-B, of the Indian Penal Code with sections 193 read with 114 of the Indian Penal Code, 186 and 153A, 186, 187 of the Indian Penal Code and under section 6 of the Commission of Inquiry Act; the Gujarat Police Act and the Protection of Human Rights Act, 1991. It is the case on behalf of the petitioner that though petitioner No.1 had tendered above complaint on 08.06.2006, the same is yet not registered as FIR by respondent No.2 herein. Instead respondent No.1, had

been personally called by respondent No.2 who after accepting the complaint did nothing. It is the case on behalf of the petitioner that pre-condition of any investigation under the Criminal Procedure Code and Indian Penal Code is registration of FIR and in the present case respondent No.2 herein himself becomes the 'court' and intends to give verdict in favour of the 'state government' by completing the investigation without registration of FIR. It is the case on behalf of the petitioner that role of the State's police was always biased especially related to its own conspiring and complicit role in the massacres of 2002. Therefore, very little can be expected from the local police and therefore, after registration of the FIR the same is required to be handed over to an independent investigating agency i.e. the CBI. It is submitted that it was mandatory duty of the police more particularly respondent No.2 to register the complaint given by the petitioner dated 08.06.2006 as FIR and as respondent No.2 failed to perform his statutory duty, the petitioners have preferred the present petition under Article 226 of the Constitution of India for the aforesaid reliefs

by directing respondent No.2 to register the complaint given by the petitioner no.1 as FIR.

3. Mr.M.S.Ganesh, learned Senior Counsel has appeared with Mr.M.M.Tirmizi, learned Advocate appearing for the petitioners. Mr.Ganesh, learned Senior Advocate has made following submission in support of aforesaid reliefs :

1. The Code 'gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed'.

2. Section 154 of the Code is mandatory and the officer concerned is duty bound to register the case if any information disclosing a cognizable offence is laid before him.

3. The question is not whether the nature and character of the offence (e.g. Conspiracy under section 120-B of IPC) has changed by the mere inclusion of a few more offenders (conspirators) as accused or by the addition of one more among the objects of the offence (conspiracy). The question is whether the two conspiracies are in substance and truth. Where

the conspiracy discovered later is found to cover a much larger canvas with broader ramifications, it cannot be equated with the earlier conspiracy which covered a smaller field of narrower dimensions. Further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court; defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it.

4. Practice, convenience and preponderance of authority, permit repeated investigation on discovery of fresh facts.

5. Occasions may arise when a second investigation started independently of the first may disclose a wide range of offences including those covered by the first investigation.

6. There is no provision in the Code that debars the filing of a second FIR and investigating into the alleged offences merely because they overlap with an earlier FIR but extend beyond the scope of the earlier FIR.

7. There is nothing in law to bar to entertainment of a second complaint on the same

facts and allegations, even when a previous complaint has been dismissed.

8. Section 173(8) of the Code is an enabling provision.

9. In a case like the present one, where the police claim to have already registered FIR under Section 154 and filed charge-sheet under Section 170 of the Code, the petitioner's complaint reinforces the need for further investigation in the pending charge-sheets under Section 173(8) of the Code. Such further investigation under Section 173(8) of the Code is legally permissible.

10. In the complaint dated 08.06.2006 submitted to petitioner No.2, Gujarat, petitioner No.1 has furnished explicitly further evidence, oral and documentary, regarding the nature and extent of the involvement of the accused named in her complaint. Therefore, further investigation in relation to commission of the offence as alleged in the complaint is certainly warranted.

11. Further evidence adduced in the complaint was well within the knowledge of the said authorities more particularly respondent

No.2, still they did not think it proper to conduct or cause to be conducted further investigation in terms of Section 173(8) of the Code.

12. Refusal or even unwillingness on the part of respondent Nos.1 and 2 to register FIR under Section 154 of the Code on the said complaint of petitioner No.1 and/or to carry out a further investigation on the further evidence, oral and documentary, furnished with the said complaint under Section 173(8) of the Code clearly amounts to dereliction and failure of public duty on the part of respondent Nos. 1 and 2. Therefore, it is requested that present writ petition requires to be entertained and relief prayed for is liable to be granted.

13. The Commissions of Inquiry Act, 1952 and the Code of Criminal Procedure. 1973 are independent and self contained statues and operate in different spheres. Commission of Inquiry appointed under the 1952 Act does not and cannot supplant or preempt an investigating agency initiating a prosecution under the Code. Such a commission has no power, authority or jurisdiction under the 1952 Act to perform or discharge those functions that a prosecuting / investigating agency alone can do under the Code. There is no statutory bar in the 1952 Act

prohibiting the initiation and continuance of investigations and further investigations under Section 154 and 173(8) of the Code and vice-versa.

14. The petition at the instance of the petitioners for the aforesaid reliefs is maintainable. The objections raised by respondent Nos.1 and 2 with respect to locus standi of petitioner no.2 is untenable as petitioner No.2 is a NGO whose standing to sue the case related to the carnage in 2002 has been expressly recognized by the Hon'ble Supreme Court.

15. It is well recognized principle of criminal jurisprudence that any one can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary.

16. Decision of the Hon'ble Supreme Court in the case of AIIMS Employees Union Case reported in (1996) 11 SCC 582; Alque Padamsee' case 2007 (6) SCC 171; which have been followed and applied by this Court in Kanubhai Dayani V/s. State of Gujarat (Special Criminal Application No.582 of 2007 decided on 25.07.2007, according to which petition under Article 226 of the Constitution of India for an

appropriate writ, direction and or order directing the police to register the FIR is not maintainable and aggrieved person has remedy by filing complaint under Section 190 of the Cr.P.C. before the Magistrate, are distinguishable, both on facts and in law and have no application to the present case. That a prayer is also made for investigation by independent agency like CBI and therefore, the petition is maintainable.

4. Learned Advocate appearing on behalf of the petitioners has submitted that the Code gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed. It is submitted that as held by the Hon'ble Supreme Court in the case of S.N.Sharma v/s. Bipen Kumar Tiwari: (1970) 3 SCR 946 followed in State of Bihar V/s.J.A.C.Saldanha : 1980(1) SCC 554; State of Haryana V/s. Bhajan Lal : (1992) Supp. 1 SCC 335 and T.T.Antony V/s. State of Kerala (2001) 6 SCC 181, in appropriate case an aggrieved person can always seek remedy by invoking the power of the High Court under Article 226 of the Constitution of India which, if the High Court is convinced that the power of investigation has been exercised by a police

officer mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers.

5. It is further submitted by the learned Advocate appearing on behalf of the petitioners that as held by the Hon'ble Supreme Court in the case of Bhajanlal (supra) and in the case of Ramesh Kumari v/s. State (NCT of Delhi) (2006) 2 SCC 677 (para 4 and 5), Section 154 of the Code is mandatory and the officer concerned is duty bound to register the case if any information disclosing a cognizable offence is laid before him. It is submitted that in Ramesh Kumari's (supra) case, the complaint was filed against the police officer and in such a situation, the interest of justice would be better served if the case is registered and investigated by an independent agency like CBI.

6. Relying upon decision of the Hon'ble Supreme Court in the case of Ram Lal Narang v/s. State (Delhi Admmn.) : (1979) 2 SCC 322, more particularly, para 11, 15, 16 to 22. It is further submitted that

investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court. It is also submitted that defective investigation coming to light during the course of a trial may be cured by a further investigation, if circumstances permit it. It is further submitted that it might be when a second investigation is started independently of the first may disclose wide range of offences including those covered by the first investigation. It is further submitted on behalf of the petitioners that there is no provision in the Code that debars the filing of a second FIR and investigating into the alleged offences merely because they overlap with an earlier FIR. For that purpose he has relied upon decision of the Hon'ble Supreme Court in the case of M.Krishna v/s. State of Karnataka :(1999) 3 SCC 247 (paras 3 to 5).

7. It is further submitted that there is nothing in law to bar or which prohibits entertainment of second complaint on the same facts and allegations, even when a previous complaint is dismissed. It is submitted that circumstances in

which such second complaint can be entertained include (1) manifest error; (2) manifest miscarriage of justice and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings; (4) where the previous order of dismissal was passed on an incomplete record or a misunderstanding of the nature of the complaint. In support of above submission learned Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of Pramatha Nath Taluqdar v/s. Saroj Ranjan Sarkar : 1962 (supp.2) SCR 297 as well as decision of the Hon'ble Supreme Court in the case of State of Rajasthan v/s. Aruna Devi (1995) 1 SCC 1 (para 4). It is further submitted that section 173(8) of the Code is enabling provision and it has been inserted as a new provision so that it may not be contended that on the submission of a charge sheet investigation came to a standstill and hands of the police officers are tied down. It is further submitted that ordinarily, a conceivable occasion for an additional charge sheet would be a disclosure of a new material. So while acknowledging and recognizing

the police officers's right to submit a fresh charge-sheet, such conceivable circumstances are put on the statute in terms of Section 173(8). It is submitted that those circumstances are enumerative and not exhaustive in character. It is submitted that if the very material is misunderstood by the police station officer and if he has received proper light from his superiors he can certainly file an additional charge sheet though there may not be strictly speaking further investigation and collection of new material. In such a case, instead of new material there is new light that is received by him. If new interpretation of the evidence is brought to his notice, the investigating officers's power cannot be curbed because of the enumeration of the circumstances of the recovery or discovery of the new material. In support of this submission, the learned Counsel has relied upon decision of this Court in the case of Deepak Dwarkadas Patel v/s. State of Gujarat reported in (1980) 21 GLR 135.

8. It is submitted that in a case like the present one, where the police claim to have already

registered FIR under Section 154 and filed charge sheet under Section 170 of the Code, the petitioner's complaint reinforces the need for further investigation in the pending charge sheets under Section 173(8) of the Code. It is submitted that such further investigation under Section 173(8) of the Code is legally permissible. In support of this submission, learned Counsel has relied upon the decision of the Hon'ble Supreme Court in the case of Jayant Vitamins Ltd. V/s. Chaitanyakumar (para 4) reported in (1992) 4 SCC 15; Ram Lal Narang v/s. State (Delhi Admin.) (para 11 to 22) reported in (1979) 2 SCC 322; State of Bihar v/s. J.A.C.Saldanha (para 19) reported in 1980 (1) SCC 554; State of Haryana v/s. Bhajan Lal reported in (1992) Supp. 1 SCC 335 (para 35 and 36); Hasanbhai Valibhai Qureshi v/s. State of Gujarat reported in (2204) 5 SCC 347 (paras 11 to 13); Zahira Habibullah Sheikh v/s. State of Gujarat reported in (2004) 4 SCC 158 (para 78 and 79). It is further submitted that in such a situation the power of the Court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in section 173(8) to

suggest that the Court is obliged to hear the accused before any such direction is made. In support of this submission, learned Advocate has relied upon the decision of the Hon'ble Supreme Court in the case of Sri Bhagwan Samardha Sreepada etc. Maharaj v/s. State of A.P. (para 10 and 11) reported in (1999) 5 SCC 740. It is submitted that section 173(8) of the Code permits further investigation and even dehors any direction from the Court as such, it is open to the police to conduct proper investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted. It is submitted that in the present case, on the basis of further evidence, oral and documentary, furnished by the complainant to the Director General of Police, Gujarat, a further investigation is warranted. In such a situation, the hands of the investigating agency or the Court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object is to arrive at truth. An effective trial for real or actual offences found during the course of proper investigation is as such relevant, desirable and necessary as an expeditious

disposal of the matter by the Courts. It is submitted that mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the Court in arriving at truth and do real and substantial effective justice. For that purpose, learned Advocate has relied upon decision of the Hon'ble Supreme Court in the case of Hasanbhai Valibhai Qureshi v/s. State of Gujarat reported in (2004) 5 SCC 347 (para 11 to 13).

9. The learned Counsel appearing on behalf of the petitioners has further submitted that in the complaint dated 08.06.2006 submitted to the Director General of Police, Gujarat, the petitioner No.1 has furnished further evidence oral and documentary, regarding nature and extent of involvement of the accused named in her complaint and the said further evidence comprises evidence as well as documentary evidence led before the Nanavati Shah Commission that established the commitment of serious, non-bailable crimes by the head of State and other responsible functionaries. It is submitted that there are

specific allegations made against individual accused. It is further submitted that it is alleged in the complaint with respect to specific transfers and disciplinary proceedings against top ranking police officers who were 'non co-perative' with the illegal actions of the head of state, but who were actually acting in conscience as per the Constitution, the law and their administrative service rules. It is submitted that there are allegations against other higher officers also. Therefore, it is submitted that under the circumstances, further investigation in relation to the commission as alleged in petitioner no.1's complaint is certainly warranted. It is further submitted that copies of the complaint were also sent to the Police Inspector, Sector – 21, Gandhinagar, Chief Secretary and the Home Secretary, Government of Gujarat. It is further submitted that even otherwise further evidence adduced in the petitioner no.1's complaint was well within the knowledge of the said officers as they had themselves deposed, orally and on affidavit before the Nanavati Shah Commission and still they did not bestir themselves qua prosecuting agency to conduct or cause

to be conducted further investigation in terms of section 173(8) of the Code.

10. It is further submitted by the learned advocate appearing on behalf of the petitioners that looking to the aforesaid facts and circumstances of the case, refusal or even unwillingness on the part of respondent Nos. 1 and 2 to register the FIR under Section 154 of the Code on the said complaint of petitioner No.1 and or to carry out a further investigation on the further evidence, oral and documentary, furnished with the said complaint under Section 173(8) of the Code clearly amounts to dereliction and failure of public duty on the part of respondent Nos.1 and 2. Therefore, it is submitted that present writ petition requires to be entertained and reliefs prayed for are liable to be granted by this Court. At this stage, learned Advocate appearing on behalf of the petitioners has relied upon the decision of the Hon'ble Supreme Court in the case of Vishwanath Chaturvedi (III) v/s. Union of India reported in (2007) 4 SCC 380 (para 39,40,43 and 44) as well as the decision of the Hon'ble Supreme

Court in the case of Union of India v/s. Sushil Kumar Modi reported in (1996) 6 SCC 500 (para 11).

11. It is further submitted that refusal to register the complaint under Section 154 of the Cr.P.C. or not initiating proceedings for further investigation under Section 173(8) of the Code on the ground that proceedings of Nanavati and Shah commission are pending cannot be accepted for the simple reason that the commission of Inquiry Act, 1952 and Code of Criminal Procedure 1973 are independent and self contained statues and operate in different spheres. Commission of Inquiry appointed under the 1952 Act does not and cannot supplant or preempt an investigating agency initiating a prosecution under the Code. It is submitted that such a commission has no power, authority or jurisdiction under the 1952 Act to perform or discharge those functions that a prosecuting / investigating agency alone can do under the Code. It is submitted that there is no statutory bar in the 1952 Act prohibiting the initiation and continuance of investigations and further investigations under Section 154 and 173(8)

of the Code.

12. Relying upon the decision of the Hon'ble Supreme Court in the case of Ram Lal Narang (supra) affirmed in Upkar Singh v/s. Ved Prakash reported in (2004) 13 SCC 292 (para 16 to 23), it is submitted that even in the case where a first complaint is registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. It is submitted that even in regard to a complaint arising out of a complaint on further investigation if it is found that there was a larger conspiracy than the one referred to in the previous complaint then a further investigation under the Code culminating in another complaint is permissible. It is further submitted that said principle applies also to a subsequent complaint by a different complainant.

13. Meeting with the preliminary objection raised by the State Government with respect to locus standi of petitioner no.2., it is submitted that so far as the petitioner no.2 -NGO is concerned, it is

the NGO whose standing to sue has been expressly recognized by the Hon'ble Supreme Court of India in other matters related to the carnage in Gujarat in 2002. Relying upon the decision of the Hon'ble Supreme Court in the case of Vishwanath Chaturvide (III) (supra), it is submitted that so far as criminal jurisprudence is concerned, any one can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. It is submitted that as observed by the Hon'ble Supreme Court in the said decision, locus standi of the complainant is a concept foreign to criminal jurisprudence. So far as the petition at the instance of the petitioner no.1. is concerned, it is submitted that complainant – petitioner no.1 is victim of offence alleged against the persons concerned, and she is victim and lost her husband. Therefore, she is personally and directly aggrieved citizen of India. Learned Advocate has relied upon the decision of the Hon'ble Supreme Court in the case of A.R.Antulay v/s. Ram Das Sriniwas Nayak reported in (1984) 2 SCC 500 followed in Manohar Lal v/s. Vinesh Anand reported in (2001) 5 SCC 407 (para 5) in

support of his submission with regard to maintainability of the petition at the instance of petitioners. Meeting with the submission on behalf of the State and reliance placed upon the decision of the Hon'ble Supreme Court in the case of AIIMS Employees Union (supra); Alque Padamsee (supra) which have been followed and applied by this Court in Kanubhai Dayani v/s. State of Gujarat rendered in Special Criminal Application No.588 of 2007 to the effect that complainant aggrieved by the refusal of the police to register the FIR must first move the jurisdictional Magistrate under Sections 190 and 200 of the Code before approaching High Court under Article 226 of the Constitution or the Hon'ble Supreme Court under Article 32 of the Constitution of India, it is submitted by Mr.Ganesh, learned Counsel appearing on behalf of the petitioners that aforesaid three decisions are distinguishable, both on facts and in law and have no application to the present case. It is submitted that they are all 'clean slate' cases i.e. cases where no previous complaint has been filed and where no previous FIR on such complaint had been registered and whose subject

matter was the same as that of the subsequent complaint. It is submitted that in the present case complaint dated 08.06.2006 of petitioner No.1 of which registration of a FIR under section 154 of the Code is sought is materially at variance with the complaints lodged, the FIRs registered and the charge sheets filed in 2002 and 2003 in respect of the same episodes / incidents in question. It is further submitted that added and distinctive features of the said complaint dated 08.06.2006, including the material allegations of petitioner no.1 are:

> (i) The petitioner no.1 is personally victim of one of the episodes of crime viz. Gulberg Society incident, in which her husband was murdered by a mob. All the incidents / crime forming the subject matter of her complaint are integrally interconnected in their initiation and execution, both by act and omission, including on the part of the State of Gujarat's executive, agencies and servants. There was larger conspiracy by the accused arraigned in the complaint. Out of five major incidents highlighted in the complaint, Section 120-B IPC figures by addition only in the three FIRs clubbed together and charge sheet filed in respect of the incident at Ode. The complainant

has invoked and demonstrated the application of section 120-B IPC to the accused arrayed in her complaint.

(ii) Petitioner No.1 complaint is based on material which was either not in existence or did not see the light of day when the said earlier FIRs were registered and charge sheets filed by the police in 2002 and 2003. These materials comprise oral depositions, affidavits and documents that have been placed on record before the Hon'ble Supreme Court and/or before the Justices Nanavati and Shah Commission of Inquiry and said materials constitute 'further evidence' within the meaning and intent of that expression in section 178(3) of the Code warranting 'further investigation' under the provision. (iii) The accused implicated by the said materials and so arrayed in petitioner no.1's complaint, are not the accused or figuring in the said earlier FIR registered and charge sheets filed by the police. Obviously there was a vested interest in Investigating / prosecuting agency in excluding all the present 63 accused from consideration of their culpability for the alleged offences and in exculpating them without even an investigation.

Making above submissions, it is requested to entertain the present petition and grant relief as

sought for.

14. The petition is opposed by the State. Shri Kamal Trivedi, learned Advocate General appeared with Ms.Sangeta Vishan, learned Additional Public Prosecutor. It is submitted that by way of present petition, the petitioners have prayed for an appropriate writ, direction and order directing respondent No.2 to register FIR with further direction same to be investigated by the C.B.I. It is submitted that the petition under Article 226 of the Constitution of India, for the aforesaid reliefs directing respondent No.2 to register the complaint of the petitioner no.1 as FIR is not maintainable and the petitioner being aggrieved of the inaction on the part of the respondent No.2 to register the FIR has remedy available under the provisions of Cr.P.C., more particularly by filing complaint under Section 190 of the Cr.P.C. before the learned Magistrate. Learned Advocate General has relied upon the following decisions in support of his submission with respect to maintainability of present petition under Article 226 of the Constitution of India for the aforesaid reliefs :

(1)All Indian Institute of Medical Sciences Employees' Union (Regd). V/s. Union of India reported in (1996) 11 SCC 582 (para 4 and 5).

(2)Gangadhar Janardan Mhatre v/s. State of Maharshtra & Ors. Reported in (2004) 7 SCC 768 (para 13 and 14).

(3)Minu Kumari v/s. State of Bihar reported in (2006) 4 SCC 359 (para 16)

(4)Hari Singh v/s. State of U.P. Reported in (2006) 5 SCC 733

(5)Prakash Singh Badal v/s. State of Punjab reported in (2007) 1 SCC 1 (para 73)

(6)Aleque Padamsee and Ors. V/s. Union of India & Ors. Reported in (2007) 6 SCC 171

(7)Unreported decision of this Court in the case of Kanubhai Shamlijibhai Dayani v/s. State of Gujarat & Ors. Dated 25.07.2007 rendered in Special Criminal Application No.588 of 2007 (para 8 and 9).

It is submitted that as held by the Hon'ble

Supreme Court in the case of AIIMS Employees (supra) when the information laid with the police, but no action in that behalf is taken, the complainant is given power under section 190 read with section 200 of the Code to lay a complaint before the Magistrate having jurisdiction to take cognizance of the offence and as in the present case the petitioner has not adopted either of the procedure provided under the Code without availing of the above procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by C.B.I. Which is not required to investigate into all or every offence.

It is submitted that similar observations are made by the Hon'ble Supreme Court in the case of Gangadhar Janardan Mhatre (supra). It is submitted that as held by the Hon'ble Supreme Court when the information is laid with the police, but no action in that behalf is taken, the complainant is given power under section 190 read with section 200 of the Code to lay a complaint before the Magistrate having jurisdiction to take cognizance of the offence and

the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. And in case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. It is further observed by the Hon'ble Supreme Court that writ application was not the proper remedy, and without availing the remedy available under the Code, the applicant could not have approached the High Court by filing writ application.

It is further submitted that similar observations are made by the Hon'ble Supreme Court in the decision in the case of Minu Kumari (supra) and

Hari Singh (supra). It is further submitted that as observed by the Hon'ble Supreme court in para 73 in the case of Prakash Singh Badal (supra), the obligation to register a case is not to be confused with the remedy if the same is not registered.

Learned Advocate General has further submitted that as held and observed in the recent decision by the Hon'ble Supreme Court in the case of Aleque Padamsee (supra), in case the Police Officers fail to register FIR whenever facts brought to their notice show that cognizable offence has been made out, modalities to be adopted are set out in Section 190 read with Section 200 of the Code. It is further submitted that relying upon the decision of the Hon'ble Supreme Court, this Court in the case of Kanubhai Shamljibhai Dayani (supra), has not entertained the petition under Article 226 of the Constitution of India, which was filed for the prayer directing police officers to register the complaint as FIR, and the petitioner was relegated to submit complaint before the learned Magistrate under Section 190 of the Cr.P.C.

15. Relying upon Section 2(d) of the Code, which defines expression 'complaint' it is submitted that whenever one refers to the expression 'complaint' it has to be before a Magistrate and not before the police / investigating authority. It is submitted that Section 2(r) of the Code defines the expression 'police report'. Learned Advocate General has referred to Section 173 of the Cr.P.C and it is submitted that section 173 deals with report of the officer on completion of investigation and as per sub – section (2) of Section 173, as soon as the investigation is completed, Officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence a police report and the officer shall communicate action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given. It is submitted that sub section (8) of Section 173 authorizes further investigation in respect of an offence after a report under sub-section 2 has been forwarded to the Magistrate. It is submitted that aforesaid sub-section (8) of Section

173 was not present in 1898 and hence a view prevailing at that time was that a report given under Section 173 was the end of the investigation which had placed hindrance in the way of investigating agency which can be very unfair to the prosecution and for that matter even to the accused. Considering above difficulties, Section 173(8) came to be brought into statute after considering the observations made by the Law Commission. Learned Advocate General has referred to and relied upon Section 190 of the Code which deals with the cognizance of offence by Magistrates. Learned Advocate General has also referred to and relied upon Section 319 of the Code which deals with the power of the criminal court to proceed against other persons appearing to be guilty of offence. It is submitted that even if a person who is not accused but during the course of trial of an offence, it appears from the evidence that such a person has committed offence, the Court can direct the issuance of summons or the arrest of such person and proceed against him for the offence which he appears to have committed. Learned Advocate General has also referred to and relied upon Section 216 of

the Code, which enables the Court to alter or add charge against the persons already arraigned as accused before it. Therefore, alternatively and without prejudice to submission that remedy is available to the petitioners to file complaint before the Magistrate under Section 190 of the Cr.P.C., it is submitted that in the present case with regard to the incidents and the offences for which complaint is filed by the petitioner, after investigation charge-sheet is filed and cases are pending before the criminal Court and therefor, it is always permissible to petitioner no.1 to avail of provisions of Section 173(8) read with Section 319 and and 216 of the Code by approaching the concerned investigating agency or the criminal Court where the proceedings are pending with reference to the concerned incidents stating inter-alia that on availability of new evidence at a later stage new offences are discovered covering a large canvass with broader ramifications which deserve to be investigated. If the Investigating agency is satisfied they may submit an appropriate application for further investigation or learned Magistrate or the Criminal Court before whom cases

are pending and the concerned Court may order further investigation if the Court is satisfied. It is also submitted that even during trial and on proper evidence being adduced, if the criminal Court is satisfied with the same and offence are committed, the criminal court can exercise powers under Section 216 of the Cr.P.C. and carry out and or add any charge. Even during trial if the criminal Court comes to the conclusion that some other accused persons have committed offence who are not charged, criminal Court can exercise powers under Section 319 of the Cr.P.C. and proceed further against those persons who are found to have committed the offence.

16. It is submitted by the learned Advocate General appearing on behalf of the State that sole basis of petitioner No.1's application / complaint and the request for investigating the said complaint is based upon some affidavits more particularly affidavit of one Shri ShreeKumar filed before Justices Nanavati and Shah Commission. Such affidavit has no evidenceary value or same cannot be based for further investigation, unless there is some further

inquiry conducted on examining said deponent in the Criminal Court more particularly by the Magistrate. Therefore it is submitted that in such a situation remedy available to the petitioners is to approach learned Magistrate by filing complaint under Section 190 of the Code. It is submitted that under Section 190 of the Code, there are three options available to the Magistrate viz. (1) He can straightway take cognizance of the offence and issue process (2) Without taking cognizance, he may direct the police to carry out the desired investigation under section 156(3) of the Code, wherein the police after investigation may file report / charge sheet as per the provisions of section 173(8) of the Code and(3) He may take cognizance but postpone the issue of the process so as to enable the further inquiry of the investigation into the matter by the police.

17. Learned Advocate General has relied upon para 8 of the decision of the Hon'ble Supreme Court in the case of Madhu Bala v/s. Suresh Kumar reported in AIR 1997 SC 3104 as well as another decision of the Hon'ble Supreme Court in the case of Union Public

Service Commission v/s. S.Papaiah reported in (1997) 7 SCC 614 (para 13). It is further submitted by the learned Advocate General that there cannot be two FIRs (not being courter case / complaint) relating to the same incident but for different offence and the gravamen thereof being same in substance. Learned Advocate General has relied upon Para 21, 27 and 28 of the decision of the Hon'ble Supreme Court in the case of T.T.Antony v/s. State of Kerala reported in (2001) 6 SCC 181 as well as para 17 and 21 of the decision of the Hon'ble Supreme Court in the case of Upkar Singh v/s. Ved Prakash reported in (2004) 13 SCC 292. Relying upon the aforesaid decisions, it is submitted that when for the incident in question complaints came to be filed, which are investigated and charge-sheet are already filed against the accused persons, second complaint for the same offence / incident is not maintainable and remedy available to the petitioners would be to file appropriate application for further investigation under Section 173(8) of the Cr.P.C., and for that purpose to approach investigating agency and/or Court. Therefore, it is submitted that the prayer of

the petitioners for registration of information as FIR with regard to the same incident and making a fresh investigation is not permissible under the scheme of provisions of Cr.P.C.

18. Now reliance placed upon the decision of the Hon'ble Supreme Court in the case of Ram Lal Narang v/s. State (Delhi Administration) reported in (1979) 2 SCC 322, it is submitted by the learned Advocate General that before the Hon'ble Supreme Court in the said case, the question was with regard to filing of second charge sheet, after facts came to light which indicated that the conspiracy which was the subject matter of the case pending in the Court was part of the larger conspiracy and such fresh facts which came to light resulted in filing of second charge -sheet. Therefore, it is submitted that the petitioners are trying to confuse the aspect relating to registration of fresh FIR under Section 154 of the Code on the one hand and filing of further charge-sheet on the other. Therefore, it is submitted that decision of the Hon'ble supreme Court in the case of Ram Lal Narang v/s. State (Delhi Administration) (supra) will not be

of any assistance to the petitioners.

19. So far as the decision of the Hon'ble Supreme Court in the case of M.Krishna v/s. State of Karnataka reported in (1999) 3 SCC 247 relied upon by the petitioners in support of their submission that filing of second FIR is permissible is concerned, it is submitted by the learned Advocate General that the said decision cannot be made applicable to the facts of the present case. It is submitted that the case before the Hon'ble Supreme Court was initially the first FIR arraigned the accused for the offence under the Prevention of Corruption Act for an earlier period i.e. 1.8.1978 to 24.08.1989 wherein ultimately the investigating officer submitted a 'B' report and thereafter, a fresh FIR was filed for the entire service period of the Government servant with a request to investigate into the assets of the employee concerned for the entire period. In that context, the Hon'ble Supreme Court took a view that there is no bar under the Code restraining the investigating agency from investigating into the alleged offences for the entire service period merely

because for same period the prosecution of the said employee could not be fructified as a result of the earlier FIR.

20. Learned Advocate General has submitted that even otherwise, present petition is required to be dismissed on the ground of belated complaint. It is submitted that the proposed FIR / complaint dated 08.06.2006 of petitioner no.1. is with reference to the incident having taken place in February 2002, which shows that the same is belated and is preferred after an inordinate delay of 4 ½ years, and the same is based upon allegations raised by third parties and that too on the basis of conjectures and surmises. It is further submitted that affidavit filed by one Shri Sreekumar filed before the Justice Nanavati and Shah Commission in the year 2004 on which the complaint is based, has been filed by petitioner no.2 in 2005, as a party petitioner to the pending writ petition being Special Criminal Application No.3217 of 2003 claiming compensation and other reliefs for the affected parties, whereas the report of the Citizens Council was of the year 2003, which were already available

with petitioner no.2 right from the very beginning. Despite that fact, nothing was done so far for all these years and it was only in June 2006, the petitioner no.1 was motivated to prefer impugned complaint.

Learned Advocate General has relied upon decision of the Hon'ble Supreme Court in the case of Thulia Kali v/s. State of Tamil Nadu reported in (1972) 3 SCC 393 and the observations of the Hon'ble Supreme Court with respect to insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eye-witnesses present at the scene of occurrence. It is submitted that it is observed by the Hon'ble Supreme Court that delay in lodging the first information report quite often results in embellishment which is a creature of afther thought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of

the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. Learned Advocate general has submitted that similar observations are made by the Court in Binay Kumar Singh & Ors. V/s. State of Bihar reported in (1997) 1 SCC 283 (para 9) and in the case of Rajeevan & Anr. V/s. State of Kerala reported in (2003) 3 SCC 355 (paras 12 and 14). It is submitted that for the very incident and offence not only FIRs were registered, charge sheet are filed, even trial has begun, thereafter by virtue of the order of the Hon'ble Supreme Court in various proceedings, said trials have been stayed.

21. Now so far as the prayer of the petitioners to direct complaint / FIR to be investigated by CBI is concerned, learned Advocate General has relied upon decision of Division Bench of this Court in the case of Shamji Ladha v/s. State of Gujarat reported in 1998(1) GLH 992. It is also submitted that apart from the fact that such prayer is made belatedly, even charge-sheets are filed long back, and said prayer is made with mala-fide intention and to invoke

jurisdiction of this Court under Article 226 of the Constitution of India and to get out of the decision of the Hon'ble Supreme Court taking a view that if concerned Police Officer refuses to register the complaint as FIR, remedy available to the aggrieved persons is to approach Magistrate by filing complaint under Section 190 of the Cr.P.C., and the petitioners may submit that learned Magistrate has no jurisdiction to direct investigation by CBI. It is submitted that such prayer is therefore, made with mala-fide and after thought which requires to be rejected. It is also submitted that even the question whether the Court can order CBI to investigate into the cognizance offence which is alleged to have been taken place in a State without consent of that State Government on the face of statutory limitations under the Delhi Special Police Establishment Act, 1946 is kept open by the Hon'ble Supreme Court and the said question is referred to larger Bench. Therefore, it requested not to grant relief as prayed for.

22. Learned Advocate General has further

submitted that so far as petitioner No.2 is concerned, petitioner no.2 has no locus so far as the relief sought in the present petition, as the relief sought in the present petition filed under Article 226 of the Constitution of India is for an appropriate Writ direction directing respondent No.2 to register the complaint submitted by the petitioner no.1 as FIR under Section 154 of the Cr.P.C. Admittedly, so far as petitioner no.2 is concerned, it has never given any complaint for which Writ is sought and therefore, no Writ can be issued in favour of petitioner no.2 when petitioner no.2 has never requested to register the same as FIR. It is also submitted that it is the petitioner no.1 who has given complaint which is not registered as FIR for which relief is sought and therefore, only petitioner no.1 can be said to be aggrieved party for issuance of Writ who has already approached this Court by way of Special Criminal Application. It is further submitted that when petitioner no.1 herself is able to come to this Court by initiating present proceedings, it is not appreciable how petitioner no.2's presence is required and/or there is no

justification for petitioner no.2 to initiate present proceedings when petitioner no.1 has approached this Court. It is submitted that presence of petitioner no.2 is not necessary party and without the same, the controversy sought to be raised in the present petition is capable of being effectively adjudicated upon. Therefore, it is submitted that present petition at the instance of petitioner no.2 is not required to be entertained and no relief is required to be granted in favour of petitioner no.2.

23. Relying upon paras 9.1 to 9.7 of the reply affidavit of the respondent State, it is submitted by the learned Advocate General that the State assigned the whole task of examining the alleged grievance of the petitioner no.1 to an independent, impartial and unconnected Officer i.e. Addl. DIG (Intelligence) one Mr.Mahapatra at the relevant time, who tried to accommodate petitioner no.1 in all respects in the matter of listening to her grievances as incorporated in the document dated 08.06.2006, by acceding to her request as regards the time, venue etc. relating to the meeting. Therefore, it is submitted that there

was never any resistance on the part of respondent State in entertaining the grievance of the petitioner no.1 and on the contrary, it was on the part of petitioner no.1 that there was reluctance to respond to the request of the aforesaid officer for the reasons best known to her. It is submitted that as such on 16.10.2006, petitioner no.1 along with her son, appeared before Shri Mahapatra but refused to get her statement recored until her alleged FIR dated 08.06.2006 is registered. It is submitted that on 21.06.2006, an intimation was sent to petitioner no.1 inter-alia requesting her to give her statement so as to enable the office to enquire into the matter in respect of any of her grievances. However, there was no response from petitioner no.1.

24. It is submitted by the learned Advocate General appearing on behalf of the State that after a period of 4 and ½ years of incident, petitioner no.1 by the aforesaid complaint dated 08.06.2006 has tried to implicate in all 63 people only on the strength of allegations raised by third party i.e. One Shri Sreekumar before Justice Nanavati and Shah

Commission, Citizen Council, etc. which has no basis or which are based on conjectures and surmises. It is submitted that thus, the wounds of 2002 incident which are almost healed up are sought to be opened up at the behest of petitioner no.2 which shows that the petition is filed not for bona fide purposes but for extraneous consideration best known to them.

25. By making above submissions, learned Advocate general has requested to dismiss the present petition by relegating the petitioner no.1 to avail other remedy available under the Cr.P.C. More particularly, Section 190 of the Cr.P.C., by approaching the Investigating agency and/or concerned Criminal Court for further investigation under Section 173(8) of the Cr.P.C. Or for availing other remedies available under the Code i.e. Under Section 216, 319 of the Cr.P.C. and accordingly it is requested to dismiss the present petition.

26. In reply to the above submission made on behalf of the State and meeting with the objections with regard to the presence of petitioner no.2 in the

present proceedings, it is submitted by the learned Counsel appearing on behalf of the petitioners that petitioner no.2 is Non Governmental Organisation struggling for legal rights of victim survivors of mass crime and is party to Justice Nanavati and Shah Commission of Inquiry and is associated with the proceedings before it since the year 2003. Therefore, submission made on behalf of respondent that petitioner no.2 has no locus standi and or in the present proceedings presence of petitioner no.2 is not required, is not required to be accepted. It is also submitted by the learned Counsel appearing on behalf of the petitioners that after charge-sheets came to be filed, the petitioners came across further materials on the basis of various affidavits filed in the proceedings before the Justice Nanavati and Shah Commission and on the basis of which complaint has been filed and under Section 154 of the Cr.P.C. it is the statutory duty of the concerned Police Officer to register the complaint as FIR and investigate the same and as concerned Police Officer i.e. Respondent no.2 has not performed his statutory duty, it is requested to allow the present petition and grant the

reliefs as prayed for. It is submitted that even on the basis of the information given by petitioner no.1 by way of complaint dated 08.06.2006 even concerned respondent could have taken cognizance of the same and could have started further investigation but despite information to the concerned respondents, they have not further investigated the matter and therefore, the petitioners have preferred the present petition for aforesaid reliefs.

27. In response to the contention on behalf of the State that that there is inordinate delay in lodging the complaint by petitioner no.1 and reliance placed upon the decision of the Hon'ble Supreme Court in the case of Thulia Kali (supra), it is submitted that there is no delay at all and aforesaid decisions are not applicable to the facts of the present case. It is submitted that in the case before the Hon'ble Supreme Court delay in lodging the FIR came to be considered at the trial and in the final judgment. It is submitted that even such contention on behalf of the learned Advocate General overlooks the provisions of Section 468 of the Code.

28. It is also further submitted that the allegations in the complaint dated 08.06.2006 travel beyond the jurisdiction of the one competent Court or police station. Thus, a particular officer in charge of a police station or a particular magistrate cannot inquire or investigate into the allegations levelled in the complaint and assume jurisdiction over the territorial width and expanse forming the subject matter of the present complaint. It is also further submitted that allegations levelled in the complaint dated 08.06.2006 travel beyond the scope of the FIRs already registered. Both in terms of the time duration as also in terms of the location of the offences i.e. territorial jurisdiction. Therefore, the submission on behalf of the State that the petitioners are to be relegated under Section 190 of the Cr.P.C. cannot be accepted, as the same cannot be said to efficacious remedy available to the petitioners. It is also further submitted that even otherwise the Magistrate has no jurisdiction for investigation by the CBI. Therefore, it is requested to entertain the present petition filed under Article

226 of the Constitution of India. Making above submissions, it is requested to allow the present petition and grant reliefs as prayed for.

29. Heard the learned Advocates appearing on behalf of the respective parties.

30. At the outset, it is required to be noted that present petition is filed by the petitioners under Article 226 of the Constitution of India for an appropriate Writ, direction and/or order directing respondent no.2 – D.G.P., State of Gujarat to register the complaint submitted by petitioner no.1 dated 08.06.2006 as FIR. It is also further prayed for an appropriate Writ, direction directing that said complaint after registration as FIR be investigated by independent agency i.e. C.B.I. It is also required to be noted that in the said complaint petitioner no.1 has basically referred to incident / cases which are as under :

(1)Naroda Patia case registered as Naroda Police Station C.R.No.I – 100/2002.

(2)Gulbarg Society registered as Meghaninagar

Police Station C.R.No. I- 67/2002.(in which petition no.1 is victim and/or affected party as she has lost her husband).

(3)Sardarpura village of Mehsana District which is registered as Visnagar Police Station C.R.No. I – 46 of 2002.

(4)Best Bakery case.

(5)Case of Kidiyad of Sabarkanta District

(6)Oad Village, Anand District case by which 2 FIR C.R.No.23/2002 and C.R.No.27/2002 have been lodged.

At the outset, it is also required to be noted that it is not disputed that petitioner no.2 has never filed complaint for which aforesaid reliefs are sought. This petition is preferred under Article 226 of the Constitution of India in which petitioners have sought reliefs of Writ of Mandamus by directing respondent no.2 to register the complaint given by petitioner no.1 as FIR. Therefore, when petitioner no.2 has never filed any complaint before the concerned respondents and/or Police Officer, there is no question of granting relief in favour of

petitioner no.2 directing respondent no.2 to register the complaint as FIR as there is no complaint by petitioner no.2 which is required to be registered as FIR. Under the circumstances, no Writ can be issued in favour of petitioner no.2. Thus, so far as petitioner no.2 is concerned, present proceedings at the instance of petitioner no.2 for the aforesaid reliefs is not required to be entertained. So far as present proceedings are concerned, it can be said that petitioner no.2 has no locus to file present petition and ask for reliefs which is sought in the present proceedings. There is another reason also why petitioner no.2's presence is not required in the present proceedings. Petitioner no.1 has given complaint dated 08.06.2006 to respondent no.2 which is not registered as FIR by respondent no.2 and therefore, present petition is filed by petitioner no.1 and therefore prayer is sought for issuance of Writ, direction directing respondent no.2 to register the complaint as FIR for which petitioner no.1 has approached this Court by way of present petition. Therefore, when petitioner no.1 as aggrieved party whose complaint is not registered as FIR, has

approached this Court and is able to come to this Court by way of present proceedings, petitioner no.2's presence in the present proceedings is not required. Petitioner no.2 might be N.G.O. struggling for legal rights of the victims survivors and might be party to Justice Nanavati and Shah Commission of Inquiry and might be associated with the proceedings before the Justice Nanavati and Shah Commission of Inquiry; the activities of such NGO is appreciable but the question is when affected party has been able to come to this Court by way of present proceedings and there are no averments in the present proceedings that petitioner no.1 is unable to come to this Court for redressal of her grievances, in that case how far presence of petitioner no.2 is necessary. Only in a case where affected party and/or aggrieved party is not in a position to approach the Court for redressal of his or her grievance, then and then only proceedings at the instance of such N.G.O. is required to be entertained and considered. Under the circumstances, and more particularly as stated above, Writ cannot be issued in favour of petitioner no.2 directing respondent no.2 to register the complaint

as FIR, which is not given by petitioner no.2, and therefore, present petition at the instance of petitioner no.2 is not required to be entertained for the relief sought in the present proceedings by holding that petitioner no.2 is not entitled for any relief as sought in the present proceedings. However, it is made clear that aforesaid observations are with respect to the present petition and this Court has not expressed any opinion with regard to credibility of petitioner no.2 NGO and or their activities. Aforesaid observations are required to be confined to the prayer sought in the present petition under Article 226 of the Constitution of India directing respondent no.2. to register the complaint given by petitioner no.1 as FIR.

31. Now, so far as the merits of the case and the reliefs prayed by the petitioner No.1 is concerned, as stated above, the petitioner has preferred present petition under Article 226 of the Constitution of India for an appropriate writ, direction or order directing the respondent No.2 – Director General of Police, State of Gujarat,

Gandhinagar to register the complaint given by the petitioner No.1 dated 8.6.2006 as FIR, whether a petition under Article 226 of the Constitution of India for the aforesaid reliefs is maintainable or not that controversy is now not res-integra. The Hon'ble Supreme Court in the case of ***ALL INDIA INSTITUTE OF MEDICAL SCIENCES EMPLOYEES' UNION (REG.)*** (supra) in paras – 4 and 5 has observed as under :-

> ***"4. When the information is laid with the police but no action in that behalf is taken, the complainant is given power under section 190 read with section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complainant as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the***

complaint under section 203 of the Code. In case he finds that the complaint / evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused.

5. In this case, the petitioner had not adopted either of the procedure provided under the Code. As a consequence, without availing of the above procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking a direction to conduct an investigation by the CBI which is not required to investigate into all or every offence. The High Court, therefore, though for different reasons, was justified in refusing to grant the relief as sought for."

32. In case of ***Gangadhar Janardan Mhatre*** (supra) in paras – 13 and 14, the Hon'ble Supreme Court has observed as under :-

"13. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under section 190 r.w. section 200 of

the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd.) V. Union of India. It was specifically observed that a writ petition in such cases is not to be entertained.

14. The inevitable conclusion is that the High Court's order does not suffer from any infirmity. The writ application

> ***was not the proper remedy, and without availing the remedy available under the Code, the appellant could not have approached the High Court by filing a writ application."***

In another decision in case of ***Minu Kumari & Another*** (supra) in para – 16, the Hon'ble Supreme Court has observed as under :-

> "***16. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under section 190 r.w. section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under section 203 of***

> ***the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Regd.) V. Union of India. It was specifically observed that a writ petition in such cases is not to be entertained.***

Thereafter in another decision in case of ***Harising*** (supra) relying upon the aforesaid three decisions, the Hon'ble Supreme Court has held that when a grievance is made that no action is being taken on the FIR lodged by the petitioner and when the information is laid with the police and no action in that behalf is taken, the remedy available to aggrieved party is to complaint under section 190 r.w. section 200 of the Code before the Magistrate and a writ petition in such case is not to be entertained.

33. In case of ***Prakashsinh Badal*** (supra) while emphasizing that it is a duty of the concerned police

officer to register the complaint as FIR, the Hon'ble Supreme Court has also observed that the obligation to register a case is not to be confused with the remedy if the same is not registered. In para – 73 the Hon'ble Supreme Court has observed as under :-

> ***"73. At this stage it needs to be clarified that the obligation to register a case is not to be confused with the remedy if same is not registered. Issue of the remedy has been decided by this Court in several cases (See Gangadhar Janardan Mhatre V/s. State of Maharastra)."***

34. In the recent decision in case of ***Aleque Padamsee & Others*** (supra) the petitioners approached the Hon'ble Supreme Court by filing petition under Article 32 of the Constitution of India stating that they have approached the Court because of inaction of the official respondents in not acting with the report lodged by two persons and the basic grievance was that though commission of offences punishable under the Indian Penal Code was disclosed, the police officials did not register the FIR and, therefore, it

was requested to issue directions to register the cases. It was stated in the said petition that the speeches made by the concerned respondents were likely to disturb the communal harmony in the country and likely result of such inflammatory speeches was to create hatred in the minds of citizens against the persons belonging to minority community. It was contended on behalf of the petitioners that as the commission of cognizable offence is disclosed even on bare reading of the FIR lodged, the authority was not justified in not registering the FIR and therefore, it was requested to issue an appropriate writ. Considering the scheme and various provisions of the Criminal Procedure Code, more particularly, sections, 145, 154, 156, 190, 200 and 203 of the Criminal Procedure Code as well as the decision of the Hon'ble Supreme Court in case of ***All India Institute of Medical Sciences Employees' Union (Regd.)*** (supra), ***Gangadhar Janardan Mhatre*** (supra) and ***Minu Kumari*** (supra), the Hon'ble Supreme Court has specifically held and observed that in case of the police officials failed to register the FIR whenever facts brought to their notice show that

cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in section 190 r.w. section 200 of the Code and finally while disposing of the aforesaid writ petitions, the Hon'ble Supreme Court issued following directions :-

> ***"8. The writ petitions are finally disposed of with the following directions:-***
>
> ***(1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained ins section 190 r.w. section 00 of the Code are to be adopted and observed.***
>
> ***(2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.***
>
> ***(3) So far as non-grant of sanction aspect is concerned, it is for the Government concerned to deal with the prayer. The Government concerned would do well to deal with the matter within***

three months from the date of receipt of this order.

(4) We make it clear that we have not expressed any opinion on the merits of the case."

It is required to be noted that at the time of hearing, the petitioners press into service a decision of the Hon'ble Supreme Court in case of ***Ramesh Kumari V/s. State (NCT of Delhi)*** reported in ***(2006) 2 SCC 677***, however, the Hon'ble Supreme Court in the subsequent decision has observed that in ***Ramesh Kumari*** (supra) the basic issue did not relate to the methodology to be adopted which has been expressly dealt with in ***All India Institute of Medical Sciences Employees' Union (Regd.)*** (supra), ***Gangadhar Janardan Mhatre*** (supra) and ***Minu Kumari*** (supra). Considering all the aforesaid decisions of the Hon'ble Supreme Court inclusive of the decision in case of ***Aleque Padamsee & Others*** (supra) this Court has taken the similar view in an unreported decision in case of ***Kanubhai Shamajibhai Dayani & Another*** reported in ***Special Civil Application NO.588 of 2007*** and this Court has observed in paras – 8

and 9 as under :-

> ***"8. Now considering the decision of the Hon'ble Supreme Court in the case of Aleque Padamsee and Ors. (supra) and other decisions referred to and considered by the Hon'ble Supreme Court in the said decision, considering the facts and circumstance of the case and the complex questions, the petitioners are to be relegated to file appropriate complaint before the concerned Magistrate under Section 190 of the Criminal Procedure Code and the prayer of the petitioners to direct the concerned Police Officer and the Director General and Inspector General of Police to register the complaint as FIR, in exercise of powers under Article 226 of the Constitution of India, is not required to be granted.***
>
> ***9. For the reasons stated above, the petition fails. Notice discharged. The petitioners are relegated to submit appropriate private complaint before the concerned Magistrate under Section 190 of the Criminal Procedure Code, the same shall be considered in accordance with law and on merits after following due***

procedure under Criminal Procedure Code. It is however made clear that this Court has not expressed any opinion on merits of the case."

35. Now, considering the aforesaid decisions of the Hon'ble Supreme Court as well as unreported decision of this Court what emerges is that the when the complaint is given and no action is taken on the said complaint and the said complaint is not registered as FIR, the remedy available to the aggrieved party is to take recourse to section 190 r.w. section 200 of the Code and for that the petition is not to be entertained. This Court has also taken consistent view considering various decisions of the Hon'ble Supreme Court that for such a relief petition under Article 226 is not to be entertained and a person aggrieved is to be relegated to invoke the remedy under section 190 r.w. section 200 of the Criminal Procedure Code by filing a complaint before the learned Magistrate. Under the circumstances, present petition filed by the petitioner No.1 under Article 226 of the Constitution of India for the aforesaid relief is not

to be entertained and the remedy available to the petitioner is to invoke the jurisdiction / remedy under section 190 r.w. section 200 of the Criminal Procedure Code.

36. Now, there is another reason also why present petition is not to be entertained. At the outset, it is required to be noted that considering the averments and allegations in the complaint at Annexure – A dated 8.6.2006 there are by and large general allegations which are on the basis of some affidavits filed by third parties, more particularly, affidavit of one Shri Shreekumar filed before Justice Nanavati & Justice Shah Inquiry Commission and some five to six incidents are narrated in the said complaint. It is to be noted that so far as five to six incidents inclusive of unfortunate incident occurred at Gulbarg Society in which the petitioner No.1 has lost her husband is concerned, in all cases, FIRs were filed in the year 2002 / 2003 and after investigation charge-sheets are already filed against the accused persons and all the cases were before the Criminal Court for trial and the trial in the

aforesaid five to six cases, which are referred to in the complaint dated 8.6.2006 are stayed by the Hon'ble Supreme Court in some proceedings pending before the Hon'ble Supreme Court. It is also required to be noted that the petitioner No.1 has submitted complaint on 8.6.2006 i.e. after the period of almost four and half years of filing of the first FIR and Charge-sheets. As stated above, basis of the allegations in the complaint is some affidavits filed by the third parties before the Inquiry Commission constituted under the provisions of the Commission of Inquiries Act. Now, whether statement / affidavits of third parties before the Inquiry Commission can be relied upon and/or considered for the inquiry and/or for making out a prima facie cognizable case is doubtful. Such affidavits / statements before the Commission have no evidentary value. In such a situation, therefore, if the petitioner No.1 is relegated to file a complaint before the Magistrate under section 190 r.w. section 200 of the Criminal Procedure Code in that case, considering the scheme of the Criminal Procedure Code, more particularly, Chapter – IXV, the Magistrate if he satisfies on

considering the averments and allegations in the complaint and on examining the complainant on oath and the witness person that a cognizable case is made out, he may issue summons / process. He may postpone the issue of process against the accused and, either inquire into the case himself or direct an investigation to be made by police officer or by such other person as he thinks fit, for the purpose of deciding whether there is sufficient ground for proceedings or not. In an inquiry in sub section – (1) of section 202, the Magistrate may, if he thinks fit, take the evidence of witness on oath provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions, he shall call upon the complainant and their witness to examine them on oath. Thus, when the petitioner No.1 is relying upon the affidavits / statements of third party, in the present case of one Shri Shreekumar, then in that case, the said person can be the witness in the complaint under section 190 of the Criminal Procedure Code and they can be examined on oath by the learned Magistrate before issuance of the summons while holding inquiry under

section 202 of the Criminal Procedure Code and if the Magistrate is satisfied after examining the complainant and the witness on oath that there is a case for proceedings further he may issue summons against the accused persons and if after examining the complainant and the witness on oath if Magistrate is not satisfied that any cognizable case is made out against person, he may even dismiss the complaint as provided under section 203 of the Criminal Procedure Code. Under the circumstances also, this is an additional ground for relegating the petitioner No.1 to avail the remedy as provided under section 190 r.w. section 200 of the Criminal Procedure Code and in the facts and circumstances of the present case, it appears to the Court that the same would be an appropriate statutory remedy available to the petitioner No.1.

37. It is also the contention on behalf of the petitioner No.1 that the offence alleged against the accused persons are not alleged in the earlier FIRs. If that is so, still the petitioner No.1 can file a complaint under section 190 of the Criminal Procedure

Code and as the petitioner No.1 is relying upon the affidavit of one Shri R.B.Sreekumar filed during the proceedings before the Nanavati Shah Commission, she may examine him as witness in the said complaint and even he can be examined by the learned Magistrate before whom the complaint is filed and that is the proper course as the evidence submitted during the proceedings before the Inquiry Commission has no evidentary value and the same cannot be the basis to make out prima facie cognizable case against the accused persons. Even straight way to rely upon such affidavits / statements during the proceedings before the Inquiry Commission and to form a prima facie opinion with regard to cognizable offence is neither desirable nor proper.

38. On going through the averments and allegations in the complaint at Annexure – A dated 8.6.2006, over and above some general allegations, the petitioner No.1 has referred to some six incidents which occurred in the year 2002 and with respect to all the aforesaid six incidents, as stated above, FIRs were already registered and after

investigation, charge-sheets are filed against the accused persons and they are pending before the competent Criminal Court for trial. If it is the case of the petitioner No.1 that thereafter they have got certain additional materials against the accused persons named in the complaint dated 8.6.2006, in that case, it will be open for the petitioner No.1 to approach the Investigating Agency with additional material requesting the Investigating Agency to further investigate considering additional material or the petitioner No.1 can herself approach the concerned Courts for further investigation and the concerned Court may, if satisfied, can order for further investigation under section 173(8) of the Criminal Procedure Code. Even during the course of the trial, if from the evidence it appears to the Court that any person not being the accused has committed any offence for such person could be tried together with accused exercising powers under section 319 of the Criminal Procedure Code and the Court may proceed against such person for the offence which he appears to have committed. Even the Court before whom the case is pending for trial is empowered to alter

or to add any charge at any time before the judgment is pronounced exercising powers under section 216 of the Criminal Procedure Code. Thus, the petitioner No.1 has also remedy under the Criminal Procedure Code itself and the grievance of the petitioner No.1 can be redressed considering the scheme of the Criminal Procedure Code.

39. Now, so far as the contention on behalf of the petitioners that as the averments and allegations in the complaint travelled beyond the jurisdiction of the competent Court or police station and therefore a particular officer in-charge of the police station or a particular Magistrate concerned cannot inquire or investigate into the allegations levelled in the complaint and assume jurisdiction over the territorial width and expanse forming the subject matter of the present complaint is concerned, at this stage, decision of the Hon'ble Supreme Court in case of ***Trisuns Chemicals Industry V/s. Rajesh Agarwal & Others reported in (1999) 8 SCC 686*** is required to be referred to and considered. In paras- 11 and 14 of the said decision, the Hon'ble Supreme Court has

observed and held as under :-

> ***“11. It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. Chapter XIII of the Code relates to jurisdiction of the criminal Courts "in enquiries and trials." That chapter contains provisions regarding the place where the enquiry and trial are to take place. Section 177 says that "every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed." But Section 179 says that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the place of enquiry and trial can as well be in a Court "within whose local jurisdiction such thing has been done or such consequence has ensued". It cannot be overlooked that the said provisions do not trammel the powers of any Court to take cognizance of the offence. The power of the Court to take cognizance of the offence is laid in Section 190 of the Code. Sub-sections (1) and (2) read thus :***
>
> ***"(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-sec. (2), may take cognizance of any***

offence -

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-sec. (1) of such offences as are within his competence to inquire into or try."

12. Section 193 imposes a restriction on the Court of Session to take cognizance of any offence as a Court of original jurisdiction. But "any" Magistrate of the first class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not.

13. The only restriction contained in Section 190 is that the power to take cognizance is "subject to the provisions of this Chapter." There are 9 Sections in Chapter XIV most of which contain one or other restriction imposed on the power of a first class magistrate in taking cognizance of an offence. But none of them incorporates any curtailment on such powers in relation

to territorial barrier. In the corresponding provision in the old Code of Criminal Procedure (1898) the commencing words were like these : "Except as hereinafter provided...." Those words are now replaced by "Subject to the provisions of this chapter...." Therefore, when there is nothing in chapter XIV of the Code to impair the power of a judicial magistrate of first class taking cognizance of the offence on the strength of any territorial reason it is impermissible to deprive such a magistrate of the power to take cognizance of an offence of course, in certain special enactments special provisions are incorporated for restricting the power of taking cognizance of offences falling under such acts. But such provisions are protected by non obstante clauses. Any way that is a different matter.

14. The jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore a fallacious thinking that only a magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to

decide as to the Court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post cognizance stage and not earlier."

Thus, considering the observations of the Hon'ble Supreme Court in the aforesaid decision, the submission of the petitioner No.1 that the learned Magistrate before whom the complaint is to be filed under section 190 will not be in a position to inquire into the case cannot be accepted. As observed by the Hon'ble Supreme Court, after taking cognizance, he may have to decide as to Court which has jurisdiction to inquire into or try the offence and that situation would reach only during the post cognizance stage and not earlier.

Even otherwise, as stated above, the allegations and averments in the complaint are general in nature except six incidents narrated for which as stated above the cases are pending before the Competent Court for trial after the charge-sheets are filed against the accused persons.

40. Now, so far as the prayer of the petitioner No.1 to direct the complaint to be investigated by the Central Bureau of Investigation is concerned, on considering the averments and allegations in the complaint dated 8.6.2006 which is sought to be investigated by the CBI, the entire complaint is by and large based upon some affidavits / statements of the third party submitted during the proceedings before the Nanavati Shah Commission, more particularly, of one Shri R.B.Shreekumar and as stated above, such statements / affidavits have no evidentary value. Solely on the basis of such statements / affidavits and without their being any further evidences such a complaint cannot be directed to be investigated by the CBI. The allegations and averments in the complaint dated 8.6.2006 are without any further material evidence. For the purpose of directing the CBI to investigate the case / complaint there must be strong prima facie case with some concrete material evidence, as to direct the CBI to investigate the complaint would have a very serious consequences and it appears to the Court that only on the basis of the averments and

allegations in the complaint dated 8.6.2006 without there being any further concrete material and/or evidence and that too on the basis of some statements / affidavits submitted during the proceedings before the Inquiry Commission, the prayer of the petitioner No.1 to direct the CBI to investigate the complaint cannot be granted. It is also required to be noted at this stage that even in case of ***All India Institute of Medical Sciences Employees' Union (Regd.)*** (supra), the Hon'ble Supreme Court was dealing with the situation wherein no action was taken inspite of the complaint having brought to the notice of the authorities and the same was not registered as FIR and direction was also sought to conduct an investigation by CBI and in that case also, the Hon'ble Supreme Court has observed and held that as the petitioner had not adopted the procedure provided under the Code by filing the complaint under section 190 r.w. section 200 of the Criminal Procedure Code, without availing of the said procedure, the petitioner is not entitled to approach the High Court by filing a writ petition and seeking direction to conduct ***an investigation by CBI*** which is not required

to investigate into all or every offence.

It is also required to be noted at this stage that the question whether a Court can order the Central Bureau of Investigation (CBI), an establishment created under the Delhi Special Police Establishment Act; 1946 to investigate a cognizable offence which is alleged to have taken place in a State without the consent of the State Government is referred to the Large Bench of the Hon'ble Supreme Court in case of ***State of W.B. V/s. Committee For Protection of Democratic Rights*** reported in ***2007(2) SCC (Cr.) 100.***

41. Now, so far as reliance placed by the learned Advocate General upon the decision of the Division Bench of this Court in case of ***Shamji Ladha V/s. State of Gujarat*** reported in **1998 (1) GLH 992** by submitting that this Court has taken the view that the this Court has no power to direct the CBI to hold any enquiry or investigation invoking the powers under Article 226 of the Constitution of India is concerned, it is required to be noted that as observed by the Division Bench of this Court in that

case the learned counsel representing the petitioners did not advance any arguments that this Court has got power to direct the CBI to hold any enquiry invoking the powers under Article 226 of the Constitution of India. Now, so far as the powers of this Court under Article 226 of the Constitution of India are concerned, are very wide and in an appropriate case the High Court may direct the CBI to hold any enquiry into the cognizable offence invoking the powers under Article 226 of the Constitution of India, however, still the question whether the same can be done without the consent of the State Government still requires to be considered which is referred to the Larger Bench of the Hon'ble Supreme Court. Even otherwise, in the facts and circumstances and looking to the averments and allegations in the complaint dated 8.6.2006 which are general in nature and which are solely based upon some affidavits / statements of third parties in the proceedings before the Inquiry Commission and without their being any further concrete material evidence, the petitioner is not entitled to the relief of directing the said complaint to be investigated by the CBI.

42. Now, so far as the question whether second FIR is maintainable or not, it is the contention of the petitioner No.1 that the averments and allegations in the complaint dated 8.6.2006 are not there in the FIRs already filed and therefore the said aspect is kept open and it will be for the learned Magistrate to consider the same and for which this Court has not expressed any opinion and this Court has relegated the petitioner No.1 to invoke the remedy under section 190 r.w. section 200 of the Criminal Procedure Code and as the aforesaid question is kept open, this Court has not dealt with all the authorities cited on behalf of the respective parties as ultimately it may affect either parties.

43. For the reasons stated above, present petition is dismissed. As the petitioners had not adopted the procedure of to file the complaint under section 190 r.w. section 200 of the Criminal Procedure Code, the petitioner No.1 is relegated to file appropriate private complaint to invoke the provisions of section 190 r.w. section 200 of the

Criminal Procedure Code by filing the private complaint and the same shall be considered in accordance with law and on merits after following due procedure under Criminal Procedure Code. It is, however, made clear that this Court has not expressed any opinion on the merits of the case in favour of either parties. Rule discharged.

[M.R.Shah, J.]

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